No. 214.

214.

Office Supreme Court U. S.
FILED
OCT 10 1898
JAMES H. McKENNEY,
Clerk.

Brief of Nolan for Appellee

SUPREME COURT

Filed Oct. 10, 1898.

.... OF ....

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY,

Appellant.

Versus

WILLIAM V. MEYERS, TREASURER OF JEFFERSON COUNTY,

Appellee.

BRIEF OF APPELLEE.

C. B. NOLAN,
Attorney General of Montana, for Appellee.

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SUPREME COURT

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E NORTHERN PACIFIC RAILROAD COMPANY,

Appellant.

vs.

LLIAM V. MYERS,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

This action was brought by the Receivers of the Northern Pa-
Railroad Company to enjoin the sale of certain l
l thereon by the County of Jefferson, Montana.

The lands having been assessed for the year 1894, the Receivers
e Northern Pacific Railroad Company appear
ty Board of Equalization at its regular July meeting, and
l to have the lands stricken from the assessme
were not taxable for that year. The applicati
lenied, and taxes were levied on the lands amo
thousand dollars. These taxes so levied rem
ppellee (the officer authorized by law to sell l
t taxes) advertised the lands for sale. The rece
sking that such sale be enjoined. To this bill a
posed. The demurrer was argued and over-r
nt (the appellee) answered, and issue having

replication and the facts having been stipulated, the court entered a decree adjudging that the lands were not subject to taxation, and enjoined the threatened sale thereof. From this decree the defendant appealed to the Circuit Court of Appeals of the Ninth Circuit, and consequent upon this appeal a reversal of the judgment of the Circuit Court was ordered, and from this judgment of reversal made and entered by the Circuit Court of Appeals the Northern Pacific Railroad Company has taken this appeal.

The stipulation of facts sets forth that the lands in question are surveyed odd sections within, the place limits of the grant to the Northern Pacific Railroad Company by act of Congress approved July the 2d, 1864. (13th Statutes, 365.) That the Railroad Company accepted the terms, conditions and impositions of this Act in due and regular form. That long prior to the assessment and tax levies complained of it prepared in the form prescribed by the Secretary of the Interior, and filed with the Register and Receiver of the district in which the lands were situate, lists of lands claimed by the Company as inuring to it under its grant, including, among others, the land described in the bill of complaint, and at said time paid the Register and Receiver of the United States Land Office the fees to which they were, by reason of such finding and listing, entitled. That the lists were certified to, allowed and approved by the Register and Receiver of the local land office. That these lists, including the lands described in the complaint, had not at the time of the assessment and tax levies complained of, been adjusted in the office of the Commissioner of the General Land Office. That the various divisions in the Commissioner's office had not examined or passed upon said lists, and it has not yet been determined in said office what lands are within the terms of the grant to said Company. That none of said described lands have been certified by the Commissioner to the Secretary of the Interior, or have been patented by the United States to the Railroad Company. That the question whether said lands are mineral or non-mineral in character has not yet been determined, and that this fact is now under investigation under the terms and provisions of the Act of Congress approved Feb. the 26th, 1895, entitled, "An Act to Provide for the Examination and Classification of certain Mineral Lands in the States of Montana and Idaho." (28th Statutes, 683.) That the Railroad Company has such right, title, interest and property in and to said lands as is conferred upon it by the Act of Congress approved July the 2d, 1864, and acts and joint resolutions of Congress supplementary thereto and amendatory thereof, and no other. That the

delay, if any, in the identification of the lands is not the result of any action, failure or default on the part of the Railroad Company. That on November 4th, 1895, the Secretary of the Interior suspended the patenting of the lands until the mineral or non-mineral character of the lands selected by the Company shall have been investigated and definitely ascertained and adjudicated by proper proceedings, and until mineral claimants and the State of Montana shall have opportunity to be heard before the Department on questions of law and fact. That under the Act of February the 26th, 1895, three Commissioners have been appointed to examine and classify the mineral lands in the Helena Land District, including the lands described in the complaint. That the Commissioners thus appointed commenced the examination and classification of the lands in said district during the year 1895, and have since continued such examination and classification, and have examined and classified only a small portion of the lands described in the bill of complaint.

It is conceded that mortgages covering this land have been executed by the Northern Pacific Railroad Company, and that the lands were assessed to the Northern Pacific Railroad Company.

The only question presented for determination is whether those lands under the laws of Montana and the laws of the United States are subject to taxation.

POINTS AND AUTHORITIES.

The sections of the constitution and laws of Montana which affect the question involved are as follows:

Section 1, Article 12, of the Constitution, "The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article."

Section 2, same Article. "The property of the United States, the State, counties, cities, towns, school districts, municipal corporations, and public libraries shall be exempt from taxation; and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity may be exempt from taxation."

Section 16, same Article. "All property shall be assessed in the manner prescribed by law except as is otherwise provided in this Constitution."

Section 17, same Article. "The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks,

franchises and all matters and things (real, personal and mixed), capable of private ownership."

Section 18, same Article. "The Legislative Assembly shall pass all laws, necessary to carry on the provisions of this article."

Section 13, Second Session Laws of Montana, 1891. "The Assessor must, between the first Monday of March and the second Monday of July in each year, ascertain the names of all taxable inhabitants and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock M. on the first Monday of March next preceding."

Section 14. "He must require from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control, at 12 o'clock M. on the first Monday in March. Such statement must be in writing, showing separately: 1. All property belonging to, or in the possession, or under the control or management of such person."

Section 34. "The Assessor must, under the direction of the State Board of Equalization, prepare an assessment book, with appropriate heading, alphabetically arranged, in which must be listed all property within the county, and in which must be specified, in separate columns, under the appropriate head:

1. The name of the person to whom the property is assessed.
2. Land, by township, range, section or fractional section.

Section 60. "The Board of County Commissioners is the Board of Equalization, and must meet on the third Monday of July in each year to examine the assessment book and adjust and equalize the valuation of the taxable property of the county. It must continue in session for that purpose from time to time, until the business of equalization is disposed of, but not later than the second Monday in August."

Section 61. "The Board has power, after giving notice in such manner as it may by rule prescribe, to increase or lower any assessment contained in the assessment book, so as to equalize the valuation of the property contained therein and make the assessment conform to the valuation of such property. Said Board of County Commissioners is vested with full power to make any changes in the valuation of property, whether such change relates to an entire class or to particular items of property, real or personal, and they shall make such changes as will result in a fair valuation of property within the meaning of this act: Provided, however, That nothing in this section contained shall confer authority upon said Board to change or alter in any way any assessment made by the State Board of Equalization of any railroad, or the property of the same, or of any person."

Section 62. "No reduction must be made in the valuation of property unless the party affected thereby, or his agent, makes and files with the Board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made."

Has The Northern Pacific Railroad Company a Taxable Interest in the Lands Within the Place Limits Under the Laws of Montana and the Laws of the United States?

The nature and character of this land grant has been so repeatedly before the court that extended reference thereto is needless. Repeated adjudications unvarying in their trend hold that the grant is one *in praesenti*, and that the title to the land vested in the Railroad Company upon the filing of the map of definite location of the road.

Railroad Co. vs. Smith, 9 Wall., 95.
Schulenberg vs. Harriman, 21 Wall., 44.
Leavenworth L. & G. R. Co. vs. U. S., 92 U. S., 733.
Missouri, Kansas & T. R. R. Co. vs. Kansas P. R. Co., 97 U. S., 491.
Railroad Co. vs. Baldwin, 103 U. S., 426.
Wright vs. Rosebury, 121 U. S., 488.
Wisconsin Central Co. vs. Price Co., 133 U. S., 496.
St. Paul M. & M. Co. vs. Phelps, 137 U. S., 528.
St. Paul P. R. Co. vs. Northern Pacific R. R. Co., 139 U. S., 1.
Deseret Salt Co. vs. Tarpey, 142 U. S., 241.
United States vs. Southern Pacific R. Co., 146 U. S., 570.
Missouri, Kansas & Texas R. Co. vs. Cook, 163 U. S., 491.

The Act of Congress granting this land to the Railroad Company operated as a conveyance of it. The vesting of the title was deferred until the filing of the map of definite location of the road, and when this was done the legal title to the lands within the place limits vested in the grantee.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241, and cases above cited.

The Railroad Company has received title to its lands by virtue of an Act of Congress. An Act of Congress making a direct grant of lands is better evidence of title than a patent.

Grignon's Lessee vs. Astor et al., 2 How., 319.
Langdeau vs. Haines, 21 Wall., 521.

The position which the Railroad Company seeks to maintain with reference to those lands is not tenable. It practically is the owner of the lands for all purposes except as to taxation. It has placed mortgages upon the lands within the place limits, and can

maintain actions in ejectment for the recovery of the possession of specific portions of the same.

Northern Pacific R. Co. vs. Hussey, 61 Fed., 231.
Deseret Salt Co. vs. Tarpey, 142 U. S., 241.

In resisting the payment of taxes on those lands within the place limits, it is urged that until the Interior Department adjudges what lands are mineral and what lands are not mineral, it is impossible for the Railroad Company to determine what portions of this land will be patented to it. In its bill of complaint it expressly avers that this land is reported to be agricultural, and that it cannot be profitably operated as mineral land.

If the Railroad Company can succeed in having legal process issued to enjoin the collection of the tax, then it has an interest in the lands which under the laws of Montana is the subject of taxation. If it has no interest in the land, it has no standing in court to enjoin the sale of the lands.

"It is argued that the opinion in effect decides that under the statute, the State of Montana has a right to assess and levy taxes upon the lands of the United States, and that if no application is made to the Board of Equalization, the sale of such public lands cannot be restrained. The plaintiff, however, in no respect represented the United States,, and an injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not."

Northern Pacific R. R. Co. vs. Patterson, 154 U. S., 130.

"The sale for taxes is made on the presumption that the purchase from the government has been *bona fide* and if not so made the purchaser at a tax sale acquires no title and consequently no embarrassment can arise in future disposition of the same land by the government."

Carroll vs. Safford, 13 How., 462.

It will be seen that the Railroad Company has no standing in court by its own admissions. If the land is mineral, title never passed to the Railroad Company or never can pass, as it is expressly reserved from the grant. If the land is not mineral the legal title absoluetly vested in the Railroad Company at the time of the definite location of the road, and the land is undoubtedly subject to taxation.

It will be noticed that when the application was made to the County Board of Equalization to strike the list of lands from the assessment roll, it was not because that the lands were mineral. As has been already observed, actions can be successfully maintained

by the Railroad Company affecting the possessory title to the land. In the determination of those actions the question of the mineral character of the lands must of necessity arise, and the rights of the litigants are determined through proofs adduced upon the trial. It might be asked, why should not proofs of a like character be admissible where the attempt is made to collect taxes? If such proof is admissible in the one case affecting the right of the Railroad Company to regain possession of a specific portion of the land within the place limits, it ought to be equally admissible for the purpose of determining whether land within the place limits is subject to taxation .

In the case of Davis vs.Wiebbold, 139 U. S., 507, it was held that where two parties had obtained patents to the same piece of ground, evidence could be introduced to show that the land was not mineral at the time of the application for a patent, and that it was not mineral at the time of the trial.

In the case of Mining Co. vs. Campbell, 135 U. S., 286, it was held that where each party had a patent from the government, and the question as to the superiority of the title under these patents depended upon intrinsic facts not shown by the patents themselves, it was competent in any judicial proceeding to establish it by proof of the facts.

See also Railroad Co. vs. Smith, 9 Wall., 95.

The legal title to the land not mineral is vested in the Railroad Company. The issuance of the patent conveys no additional rights, so that there is no disposition of public domain in the issuance of the patents to lands within the place limits. It is true that the determination of the character of the land as to being mineral, made by the Interior Department, in the absence of fraud is exclusive. Though this is so it is respectfully urged that as affecting the taxibility of the lands a judicial determination of their character as to being mineral or not would be controlling.

There was no unwillingness on the part of the Railroad Company to pay taxes upon lands within the place limits until the decision in the Barden case was made, and until the passage by Congress of the Act of February the 26th, 1895, *supra.* It is now insisted that by reason of the decision referred to no title to any specific land has been secured within the place limits.

Before the decision in the Barden case there had been more or less discussion as to whether or not the Railroad grants excluded mineral lands which at the time of the passage of the Act were not known to be mineral. The question was set at rest by the decision in this case. Mr. Justice Field, speaking for the court, said:

"It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral."

It was contended that the construction which was given to the Act by the court would prevent the States and Territories from taxing the property of the Company unless they could tax the whole property, mineral as well as agricultural lands. In reply to this contention the court said:

"We do not see why not. The authority to tax the property granted to the Company did not give authority to tax the minerals which were not granted. The property could be appraised without incurring any consideration of the minerals."

In the case of the Northern Pacific Railroad Company vs. Patterson, 154 U. S., 132, which involved the question of the taxability of those lands, the court said:

"The ground upon which it was asserted that these lands were not subject to taxation was that they had not been identified as lands passing to the plaintiff under its grant, because the United States had refused to certify them, and held them suspended "for the reason that it is claimed that such lands are mineral and are excepted from the grant to the plaintiff." It was said in Wisconsin Central Railroad vs. Price, 133 U. S., that 'he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation,' and plaintiff does not state whether all or any part of the lands are mineral or non-mineral. If the legal or equitable title to the lands or any of them was in the palintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

It is true that the latter case was disposed of upon other grounds, but the language of the court is indicative of its views upon the question of the taxability of the lands within the place limits. It might be remarked in this connection that the court, when this language was employed, had in mind the consequences of the decision in the Barden case, and had in mind the hardships which were suggested upon the presentation of the case in the event that it should be adjudged that the Railroad Company secured no title to mineral lands. The Barden case was argued on the 11th of April, 1894, and decided on the succeeding 26th of May. The Patterson case was argued on May the 12th and decided on the same day in which the Barden case was decided.

Does the Uncertainty Arising From the Determination of the Character of the Lands Relieve Them From Taxation?

It is respectfully insisted that this court has answered in the negative in the case of Railway Co. vs. McShane, 22 Wall., 445.

The act of July the 1st, 1862, creating the Union Pacific Railway Co., enacted Section 3, as follows:

"There is hereby granted to the said Company, for the purpose of aiding in the construction of said railroad, and to secure the safe and speedy transportation of the nation's troops, munitions of war and public stores thereon, every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within the limit of ten miles on such road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached istelf at the time the line of such road is definitely fixed; and all such land so granted which shall not be sold or disposed of by said Company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other lands at a price not exceeding one dollar and twenty-five cents per acre to be paid to said Company."

It was held that this contingency of settlement and pre-emption was too remote and indefinite to relieve from taxation the lands thus granted to the company.

The question of the taxation of lands granted to aid in the construction of railroads was first considered by this court in the case of Railway Company vs. Prescott, 16 Wall., 603.

It was next considered in the case of Railway Co. vs. McShane, *supra.*

It was next considered in the case of Northern Pacific Railroad Company vs. Traill County, 115 U. S., 610. It was no doubt the language employed in that case that induced Congressional action providing for the taxation of those lands. Justice Miller, expressing the views of the court, spoke as follows:

"We are aware of the use being made of this principle by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation. The remedy lies with Congress and is of easy application. If that body will take steps to enforce its lien for these costs of survey, by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed for its expenses in making the survey, and the States and Territo-

ries, in which the lands lay, be remitted to their appropriate rights of taxation. The courts can do no more than declare the law as it exists."

This decision was made in December, 1885, and on the succeeding July Congress passed the Act already referred to, which provided expressly for the taxation of lands granted to railroad corporations by act of Congress, which Act was in full force and effect at the time of the assessment of the lands whose sale is enjoined.

In Central Pacific Railway Co. vs. Nevada, 162 U. S., 512, the court, considering the taxation of these lands, used the following language:

"It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands; not only minerals but mineral lands; that the right and power to ascertain which of thes lands are mineral and which non-mineral is vested exclusively in the officers of the government, and can be proved only by the issue of a patent, as held by this court in *Barden vs. Railroad*, 154 U. S., 288. It is argued that if the railroad company paid taxes upon these lands, it might never own or acquire them, and the tax would consequently be paid on property it never owned or could own; and that, upon the other hand, if the company should not pay the taxes, and the lands be sold under the judgment appealed from, the title to the lands, if the assessment were valid, would pass to the purchaser whether they were mineral or not....It is true that in the *Barden case* we held that mineral lands were excluded from the operation of the Northern Pacific Railroad land grants, whether such mineral lands were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms; but nothing was said in that case to impugn the authority of previous cases which had held that these grants were *in praesenti* of lands to be afterwards located. They became so located when they were surveyed. "Then the grants attached to them, subject to certain specified exceptions, "one of which was that minerals should be discovered upon them before the issue of a patent, when as to such lands the title of the company failed. The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railway company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company with respect thereto to evade its just obligations to the State."

In the light of these declarations it is respectfully insisted that the taxability of those lands within the place limits is no longer an open question. It is possible that the uncertainty which arises by reason of the exclusion of mineral lands from the grant would affect the value of the property rights the Railroad Company has in the lands within the place limits. Undoubtedly the County Board of Equalization, if application were made, would consider that feature

of the case in the light of the appraised value made by the proper officer for taxation purposes. No complaint of this kind was made; the request was addressed to the Board to strike them off the taxable list of the country. That the Board acted correctly in its refusal to do so in the light of the possessory and proprietary interest of the Railroad Company in the lands in question we most emphatically urge.

Northern Pacific R. R. Co. vs. Traill Co., 115 U. S., 600.
Wisconsin Central R. R. Co. vs. Price Co., 133 U. S., 496.
Northern Pacific R. R. Co. vs. Walker, 47 Fed., 681.
Northern Pacific R. R. Co. vs. Wright, 51 Fed., 68.
Ib. 54 Fed., 67.
Myers vs. Northern Pacific R. R. Co., 83 Fed., 358.
Northern Pacific Railroad Co. vs. Patterson, 154 U. S., 130.
Barden vs. Northern Pacific R. R. Co., 154 U. S., 288.
Central Pacific Railway Co.vs. Nevada, 162 U. S., 512.
State vs. Central Pacific Railway Co., 20 Nevada, 373.
State vs. Central Pacific Railway Co., 21 Nevada, 258.

The taxing power of the State is never presumed to be relinquished, and it exists unless the intention to relinquish is declared in clear and unambiguous terms admitting of no other reasonable construction. This is a canon which has been promulgated by this court in numberless decisions. The Constitution of the State of Montana in clear and unmistakable language provides for the taxation of all property except such as is expressly exempted. The property of the United States is expressly exempted, but the interest which the conceded facts show are vested in the Railroad Company to lands within the place limits are not exempted. The acts of the Legislative Assembly of the State of Montana in equally clear and explicit terms provide for the taxation of such interests. The Railroad Company is in the possession and enjoyment of this land, constituting an immense domain within the territorial limits of the State of Montana. It invokes the aid of the State in securing it in the peaceful possession and enjoyment of this domain, and it is respectfully urged that it accords with equity and justice that it should bear a proportionate share of the burdens of taxation to maintain the government of the State.

Respectfully submitted,

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Attorney General of the State of Montana,
For Appellee.